the affidavit filed by the respondent in support of it is relevant to the question whether the New Action is frivolous and vexatious. For the first time, more than three years after the event, he alleged that in the course of the discussions prior to the execution of the Agreement he had made it clear that his lands comprised in the New Town project should on no account be utilized in any way to discharge Southern Estate debts to the appellant and that the appellant's representative agreed to this. There is no suggestion that there had been any misrepresentation about the terms of the Agreement as reduced into writing, or that he signed the Agreement without reading it or was unaware that the only provision in it which related to the lands comprised in his New Town project was that which exempted them from the requirement in Clause 2 (3) that he should at the request of the appellant execute a charge upon his lands. On the contrary he relied upon that provision (erroneously referred to as Clause 3) in support of his account of the oral discussions which preceded the execution of the Agreement — not as departing from what had previously been orally agreed. This affidavit was avowedly made after he had consulted fresh solicitors. The only ground on which he sought to rely for setting aside the judgment was that the consideration for the Agreement (*viz.* forbearance to sue Southern Estate) had wholly failed.

This summons was dismissed on March 13, 1972; but before the postponed auction could be held, the respondent started the New Action. The undisputed facts relating to events occurring during the period between the execution of the Agreement of November 21, 1968 and the commencement of the New Action on May 16, 1972, which their Lordships have recited, in their view make it clear beyond a peradventure that the respondent's case of fraudulent misrepresentation inducing the Agreement is bound to fail. They agree with the High Court judge that the New Action "is nothing but merely a new twist to overcome [the respondent's] difficulty in raising the loan and to delay the execution of judgment against him". Their Lordships do not doubt that the Federal Court, but for the fact that it mistakenly considered that it was precluded from examining the evidence, would have come to the same conclusion. They note with regret that even if the New Action be now summarily dismissed it will have succeeded in delaying execution of the judgment in the Old Action for nearly three years — which may be longer than the period which would have been taken by its going to trial.

Their Lordships will advise His Majesty the Yang Dipertuan Agung that the appeal should be allowed and the Order of the High Court in Borneo restored and that the respondent should pay the appellant's costs here and below.

Appeal allowed.

Solicitors: *Slaughter & May; Coward Chance.*

CHOP SENG HENG v. THEVANNASAN & ORS.

[P.C. (Lord Wilberforce, Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton and Sir Thaddeus McCarthy) May 21, 1975]
[Privy Council Appeal No. 24 of 1973]

Negligence — Lorry parked on correct side of highway with lights on — Another lorry crashing into stationary lorry from behind — Responsibility for accident — Apportionment of liability.

This case arose out of an accident which occurred when a lorry owned by the appellants and driven by their employee crashed into the rear of a stationary lorry owned by the second respondents which was in charge of their employee, the first respondent. The third respondent was a passenger in the appellant's lorry, being employed by them as an attendant. He sustained serious injuries as a result of the collision and sued the owners of both the vehicles and their respective drivers. In the High Court Suffian F.J. (as he then was) held that both drivers were to blame and he apportioned the liability of the first and second respondents at 75% and that of the appellant and their driver at 25%. On appeal to the Federal Court by the first and second respondents and a cross-appeal by the appellant, the majority (Ong C.J. dissenting) exculpated the first and second respondents and held the appellants solely liable ([1973] 1 M.L.J. 254). The appellants appealed to the Privy Council.

Held, allowing the appeal: (1) in this case all the members of the Federal Court had accepted the trial judge's finding that the first respondent had parked his car too close to the corner. This finding when considered in conjunction with the time of the accident and the weather conditions then prevailing, made it clear that the first and second respondents were rightly blamed in part for the accident;

(2) in the circumstances of this case the trial judge was entitled to hold that not only was the driver of the stationary lorry to blame for parking as he did, but that the driver of the oncoming lorry contributed to the plaintiff's injuries by the speed at which he was travelling when he struck the second respondents' lorry;

(3) as there was no misdirection by the trial judge in this case and no error in principle had been established, the 75:25 apportionment arrived at by the trial judge would be restored.

Cases referred to:-

(1) *Bolton & Ors.* v. *Stone* [1951] 1 All E.R. 1078.
(2) *Kelly* v. *W.R.N. Contracting Ltd. & Anor.* [1968] 1 All E.R. 369 at p. 370; [1968] 1 W.L.R. 921.
(3) *Coote* v. *Stone* [1971] 1 W.L.R. 279.
(4) *Chan Loo Khee* v. *Lai Siew San & Ors.* [1971] 1 M.L.J. 253.
(5) *Tidy* v. *Battman* [1934] 1 K.B. 319 at p. 322.
(6) *Waller* v. *Levoi* (1968) 112 S.J. 865.
(7) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372.
(8) *The Macgregor* [1943] A.C. 197.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Lord Gifford for the appellants.

Eugene Cotran, Barney Desai and *Nigel Murray* for the respondents.

Lord Edmund-Davies (delivering the judgment of the Board): This is an appeal from the judgment of the Federal Court of Malaysia allowing the appeal of the first and second defendants and dismissing the fourth defendants' cross-appeal from a judgment of the High Court in Malaya. The proceedings arose out of a road accident which occurred when a lorry owned by the fourth defendants and driven by the third defendant, their employee, crashed into the rear of a stationary lorry owned by the second defendants which was in the charge of their employee, the first defendant.

The plaintiff was a passenger in the fourth defendants' lorry, being employed by them as an attendant. He sustained serious injuries as a result of the collision and sued the owners of both vehicles and their respective drivers.

Suffian F.J., who awarded the plaintiff $47,125 damages, held that both drivers were to blame, and apportioned the liability of the first and second defendants at 75%, and that of the third and fourth defendants at 25%. On appeal to the Federal Court by the first and second defendants and a cross-appeal by the fourth defendants, the majority exculpated the first and second defendants and held the fourth defendants solely liable. But Ong C.J. arrived at the completely opposite conclusion, holding that the first and second defendants were 100% responsible for the accident and the fourth defendants free from all blame. The fourth defendants now appeal from the majority finding and submit that, in accordance with the dissenting judgment of Ong C.J., their driver should be absolved from liability for the accident or, alternatively, that the 75:25 apportionment of blame made by the learned trial judge should be restored.

The accident in which the plaintiff received his injuries occurred at about 3 a.m. on the morning of February 4th, 1969 on the Bentong/Kuala Lumpur road in the State of Pahang. The road was a winding one and there was mist which somewhat reduced visibility. The learned trial judge found that, after rounding what was described as "a blind left-hand bend", the first defendant stopped his lorry as his mate wanted to urinate. He parked it on its correct side and with its lights on, including the offside rear flasher. The road was 26'8" wide and there was ample room for an overtaking vehicle to have passed it in safety. Yet the fourth defendants' empty lorry (carrying proper lights) crashed into its rear and pushed forward a distance of 18 feet the stationary lorry with its load of 100 bags of cement.

The plaintiff alleged against the first defendant (*inter alia*) that he placed "his motor lorry in such a position as to disallow other traffic to pass him safely;" and against the third defendant that he failed to keep a proper look out and drove at an excessive speed.

The third defendant was charged in the Magistrate's Court at Bentong with dangerous driving and on January 12, 1970, he pleaded guilty to that charge. But during the long interval between the accident of February, 1969, and the trial before Suffian F.J. on June 17, 1972, both he and the attendant of the stationary lorry had sought employment elsewhere and could not be traced. In the event, the only eye-witnesses called were the plaintiff and the first defendant. Two of the main issues were (a) the speed at which the third defendant was driving, and (b) where in relation to the sharp bend the first defendant had stopped his vehicle. As to (a), the trial judge said:

"There was mist around and yet . . . the absent third defendant drove round a blind corner at 35 m.p.h. I am of the opinion that that was a bit fast in the circumstances; probably he drove at that speed as his lorry was empty and he thought that it would have been safe to do so in view of the little traffic on the road at that time of the night".

Issue (b) was more strongly contested. Whereas the first defendant contended that he stopped his lorry on a straight stretch of the road "four or five chains from bend", the plaintiff asserted that "it was about 30 feet after the bend" and that he first saw it when it was about 12 to 15 feet away. It is unnecessary to deal in detail with the points relied upon in support of these varying versions, and it is sufficient to quote from the judgment of Suffian F.J., who said:

"Having given all this evidence the best consideration I can give it, I find it more probable than not that the accident occurred because the first defendant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend . . . the primary cause of the accident was the fact (as found by me) that the driver of the stationary lorry had parked his car too near the exit of a blind corner".

It is against the background of these findings of fact by the trial judge that the two matters raised in this appeal have to be considered, and to these their Lordships now turn.

1. Causation

For the reasons already indicated, the trial judge held that both drivers were to blame for the accident. That conclusion was based on his primary findings regarding the place where the first defendant parked his lorry and the speed at which the third driver went around the blind bend. It is important to have it in mind that, though those findings were criticised in the Federal Court and before this Board, they were accepted *in toto* by all three members of the appellate court. The proceedings in both lower courts having accordingly proceeded upon the basis of those findings, it would be quite wrong for their Lordships to interfere with them unless they were demonstrably unsupported by and contrary to the evidence, which is certainly not the case. How, then, did the majority hold on such findings that the first defendant had in no way contributed to the accident, while the Chief Justice held that he was wholly responsible for it?

Their Lordships have to say respectfully that the majority view is based on a clear error of law regarding the duty owed by drivers who park vehicles upon the highway. The nature of that error is best indicated by quoting from the judgment of Ali F.J.:

". . . the act of negligence by [the first defendant], if at all, was the act of parking his lorry too close to the blind corner. The question which arises is, what was his common law duty in the circumstances? Stopping or parking a vehicle on the road can by no means be an unlawful act unless, of course, it is so provided by statute. We are here concerned with the law of negligence which involves the consideration of a driver's duty to take care. On the finding of facts in this case I fail to see how [the first defendant] can be said to have failed in his common law duty to take care. He parked his lorry with its rear lights on and in such a manner as to leave enough space for vehicles coming from the rear to pass through safely. Does the law require him to do anything more? As pointed out by Lord Normand in *Bolton & Ors.* v. *Stone* [1951] 1 All E.R. 1078,

'It is not the law that precautions must be taken against every peril that can be foreseen by the timorous.'

Was he required by law to park his lorry more than 30 feet from the corner? If so, how far away? The learned trial judge did not say how far away from the corner could be a safe distance to park the lorry. The reason is clear because it is impossible to lay down any hard and fast rule. Parking anywhere on the road undoubtedly involves some risks."

Then, after quoting from the speech of Lord Porter in *Bolton's* case, Ali F.J. continued:

"With great respect to the learned trial judge in this case I do not agree with him that the first appellant was guilty of negligence merely because he parked his lorry too close to the corner. I take the view that he did what a reasonable driver would have done in similar circumstances."

In his short concurring judgment, Gill F.J. observed:

"As I said in the case of *Chan Loo Khee* v. *Lai Siew San & Ors.* [1971] 1 M.L.J. 253 ... I have not been able to find a single decided case where the owner or driver of a vehicle leaving it on the highway with its lights on has been held liable in negligence.

Each case, of course, must depend upon its own facts. But in view of the findings of fact made by the learned trial judge in this case, I do not see how the appellants can be held to blame in any way for the accident."

This conclusion has at least the merit of clarity. No matter what the nature of the road (be it straight or winding) a driver who parks his car on the highway at night with its lights on can never, it would appear, on those facts alone be guilty of negligence. Nor does it make any difference that the parking is done "too close" or "about 30 feet" from a blind corner in the depth of a misty night. Were that indeed correct, the injunction in paragraph 39 of the Malaysian Highway Code ("Never leave your vehicle on the road close to a bend or road junction ... ") would be merely a piece of grandmotherly advice which can be ignored with impunity.

In reality, however, such parking of vehicles as occurred in this case can and does create situations of likely danger of a kind quite unlike those remote possibilities of harm with which *Bolton* v. *Stone*[1] was alone concerned. Nor does the judgment of Ashworth J. in *Kelly* v. *W.R.N. Contracting Ltd. & Anor.*[2] (*post*) cited by Ali F.J. afford support for the view he expressed. That case is no authority for the view that the place of parking is irrelevant to negligence, for, as emerges clearly from the report of that case in [1968] 1 All E.R. 369, at 370, (unlike the version in [1968] 1 W.L.R. 921 cited by Ali F.J.), Ashworth J. was there dealing with a collision between an oncoming lorry and a small car parked deliberately at a point on a wide road where it was visible for at least 100 yards, its nearside wheel being on the pavement and little more than 3 feet of its body projecting into the 31-feet wide road. As the report indicates,

"*in the circumstances,* his Lordship held that there was no ground whatever on which (the driver of the parked vehicle) could be found to have been negligent at common law".

Coote v. *Stone*[3] again affords no support for the proposition that bad parking can never of itself give rise to liability for negligence. There the plaintiff's car collided on a clear and very bright day with the rear of the defendant's car parked by the grass verge on a clearway 21'6" wide and which was visible for 500 yards. The contest was as to whether the trial judge had been right in thinking that the defendant's undoubted breach of a traffic regulation gave rise to a claim in damages, and the decision is of no relevance to the present case.

There should finally be considered *Chan Loo Khee* v. *Lai Siew San & Ors.*[4] (*ante*), decided by a Federal Court constituted as in the present case. It is difficult to follow why it was cited by Ali F.J. in apparent support of the proposition that bad parking is of itself *nihil ad rem* in an action for negligence. Its facts were widely different from those of the present case, and to attempt to extract from it any legal principle of general application is to ignore the ever-timely warning of Lord Wright in *Tidy* v. *Battman*,[5] that —

"It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts".

It is no part of their Lordships' present function to express any view regarding the correctness of the decision of the majority in *Chan Loo Khee* v. *Lai Siew San and Ors.* (*ante*), nor should they be regarded as expressing any. But what they do respectfully and emphatically approve of is the following statement of general principle enunciated by Ong C.J. in his dissenting judgment in that case (at page 254):

"If parking a car, however recklessly, so as to cause needless obstruction to other road users, were to be held blameless, merely because other motorists could still have room to pass, *provided they kept a proper look-out,* then it would appear that the deliberate parking of a car anywhere, even in the middle of the highway, should be considered equally excusable, if not justifiable, regardless of the fact that, by reason of such obstruction, other motorists had come to grief by reason of their not being fully alert. In such cases there should, in my opinion, be proper apportionment of blame, depending on the circumstances. But, to exonerate the obstructionist completely — when it is undeniable that, but for the presence of the obstruction, there could not possibly have been an accident — is to ignore the principle of placing the blame fairly on those to be blamed for their acts or omissions. In this age of fast motor transport I think it is the duty of the courts to eschew excessive legalism and to require that every motorist should observe the golden rule of showing due consideration for other road-users, or suffer the consequences of his failure to do so."

Although Gill F.J. had failed to find any reported case supporting the view so expressed by the Chief Justice, so clearly right is it that, with respect, it needs no support. But were there such a need, the Court of Appeal decision in *Waller* v. *Levoi*[6] supplies it, a motorist who parked a car on a bend in daylight there being held one-fifth to blame for the injuries sustained by a motor cyclist who collided with it. Salmon L.J. (as he then was) said that the motorist

"was also negligent because parking a car on a bend was unwise. He should have foreseen that someone might come along rather quickly or without keeping a proper look-out and that such a person would be put in an extremely difficult position if there were a car parked on a bend."

In the present case, all three members of the Federal Court accepted the trial judge's finding that the first defendant had, in the words of Ali F.J., "parked his lorry *too close to the corner*". This finding, when considered in conjunction with the time of the accident and the weather conditions then prevailing, makes it clear that the first and second defendants were rightly blamed in part for the accident. It follows that, on the issue of liability, the appeal of the fourth defendants should be allowed.

But was Ong C.J. right in accepting their further submission that they were themselves wholly free from blame and that the first and second defendants should be held solely responsible for the accident? The learned Chief Justice said:

"As regards speed, 35 m.p.h. going round a bend on the open road cannot *per se* be evidence of negligence for any vehicle keeping to its own side of the road, unless the bend taken was such that a vehicle at that speed had to encroach on the path of oncoming traffic. The learned judge, quite rightly, expressed the opinion that probably the [fourth defendants'] driver *thought it safe* to do so in view of the little traffic at that time. Since this driver negotiated the bend without any difficulty, it was, of course, a reasonable speed, expecting no obstruction in his own path round the bend ... This driver could not reasonably be required to anticipate an obstruction lying directly in his path, of which there were no warning signs whatsoever."

The contrary view was succinctly expressed by Ali F.J. who said —

"I entirely agree with the trial judge that [the third defendant] was negligent in driving round the blind corner at 35 miles an hour."

The trial judge was entitled to have regard to the third defendant's plea of guilty to the charge of dangerous driving preferred against him, though he made no express reference to it in stating his conclusion. And in their Lordships' judgment he was clearly entitled to treat the speed of 35 m.p.h. as relevant to the apportionment of blame. The plaintiff's claim was for damages for the serious injuries sustained by him in the collision, necessitating amputation above his left knee. That the impact was extremely heavy is demonstrated by what happened to the second defendants' lorry when it was struck, and it is legitimate to hold that, on balance, the probabilities are that the plaintiff would have been less severely injured had the impact been less violent, as would have been the case had the third defendant driven more slowly around the bend. Even so, he was able to attempt to swerve away from the stationary lorry, and, had his speed been lower, he might also have been able to make some use of his brakes and so lessen the force of the impact even though he failed to avert it entirely. In the judgment of their Lordships, accordingly, the trial judge was entitled to hold, as he did, that not only was the driver of the stationary lorry to blame for parking as he did, but that the driver of the oncoming lorry contributed to the plaintiff's injuries by the speed at which he was travelling when he struck the second defendants' lorry.

II. Apportionment

The apportionment of blame arrived at by the learned trial judge is attacked by counsel on behalf of the owners of both vehicles, while counsel for the plaintiff is not so much concerned with the manner of apportionment as with securing the restoration of the original finding that both drivers were to blame.

Submissions that the trial judge misdirected himself when apportioning the blame as he did are, in their Lordships' judgment, ill-founded. This case is, accordingly, unlike *Kerry* v. *Carter*[7] where, in a personal injuries case, the Court of Appeal interfered with the trial judge's apportionment on the ground that he had substantially misdirected himself on matters of fact.

There being no misdirection in the present case, whether or not their Lordships would have apportioned the blame in the same manner as did the trial judge is neither here nor there. No error in principle has been established and, applying *The Macgregor*,[8] their Lordships would accordingly restore the 75:25 apportionment arrived at by Suffian F.J.

In the result, the case is one in which their Lordships consider that they ought to advise the Yang Dipertuan Agung to allow the appeal of the fourth defendants and restore the judgment and order of the learned trial judge. They further consider and will advise that the first and second defendants should be ordered to pay the costs incurred by the fourth defendants and the plaintiff both before this Board and in the Federal Court.

Appeal allowed.

Solicitors: *Gasters; Wilson Freeman; Le Brasseur & Oakley.*